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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,	
Plaintiff and Respondent,	G038778
v.	(Super. Ct. No. 01WF2844)
CUAUHTEMOC AGUSTIN REYES et al.,	O P I N I O N
Defendants and Appellants.	

Appeal from a judgment of the Superior Court of Orange County, Francisco P. Briseno, Judge. Affirmed.

William J. Kopeny & Associates and William J. Kopeny for Defendant and Appellant Cuauhtemoc Agustin Reyes.

Kristin A. Erickson for Defendant and Appellant Arthur Frank Zavala.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck and Scott Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

*****Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part IIB., C., and D.

A jury convicted Cuauhtemoc Agustin Reyes and Arthur Frank Zavala of kidnapping to extort a ransom. (Pen. Code, § 209, subd. (a); all further undesignated statutory references are to the Penal Code.) Reyes contends the trial court erred in denying his motion to suppress evidence, including the name of his cell phone carrier and records subsequently obtained from that carrier, after an employee at a private mail facility displayed to investigating officers the exterior envelope of a bill addressed to Reyes by the carrier. Reyes also challenges the admission of a lock pick set found in his possession, Zavala contests a pretrial photo identification as unconstitutionally suggestive, and both defendants contend the statutorily mandated life term for aggravated kidnapping amounts to cruel or unusual punishment under the California Constitution. As we explain, none of these contentions has merit, and we therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Around 9:00 p.m. on November 16, 2001, 30-year-old Farsheed Atef exited an electronics store in Fountain Valley. As he placed his purchases in the trunk of his car, he noticed a white van parked in the adjacent stall, with its door open. A man approached Atef asking if he would like to view merchandise in the van and, when Atef rebuffed him, the man and a compatriot tried to abduct him. Atef broke free after a struggle and ran, yelling for help. The occupants of a silver, two-door Honda pulled alongside to offer their aid, and Atef clambered into that car through an open passenger window. The Honda sped off.

Atef realized he had been set up when his would-be rescuers ignored his pleas to take him to a police station and instead turned down a deserted road. Atef kicked

the steering wheel, forcing the Honda to veer and collide with a pole. The white van approached and parked behind the Honda. Atef escaped from the Honda and tried to flee, but two men tackled him to the ground. They forced him into the back of the van, blindfolded him, and took his wallet and keys.

Despite his blindfold, Atef discerned that one man from the Honda joined the two in the van, which entered the 405 freeway heading south. His abductors emptied his pockets, tearing to shreds anything they found. Atef was very frightened. The van left the freeway after about 10 minutes, and pulled into a parking lot. Another man, who Atef later identified as Zavala, entered the van screaming that Atef had stolen money from someone and they were "here to get it back."[1] The van proceeded to another location, the parking lot of a Travelodge motel, where Zavala removed Atef's blindfold, showed him a photo album containing photographs of his business, residence, and family members, and threatened to harm Atef's mother if Atef did not cooperate.

The men walked Atef to a room in the motel, blindfolded him again, removed his shoes, and directed him to lie down on a bed. They disclosed he would be held until he withdrew $80,000 from his account the next day. His captors scoffed when he denied having such funds. Zavala attempted to verify the account balance, apparently telephonically, by using information on Atef's bank card and, when his attempts failed, he punched Atef in the head. Zavala accused Atef of providing an inaccurate Social Security number, and ordered him to produce it again. Atef, though in great fear, retorted that he believed Tamraz was behind the kidnapping and, in any event, could confirm his

[1] Atef testified at trial he ran a computer consulting business in Tustin named DNA Micro and that, some time before the kidnapping incident, a former account manager, Anthony Tamraz, left DNA Micro on "bad terms," filing an $80,000 civil suit against Atef.

Social Security number. Zavala placed a call to someone who indeed verified the number.

The kidnappers forced Atef to identify the key to his office on the key chain they had taken from him, and also extracted from him the alarm code for the office security system and the location of his checkbook there. Zavala, who had punched him, threatened him, and made most of the demands for financial information, forced Atef to swallow a pill that made him drowsy. Before falling asleep, Atef overheard his captors laughing, ordering a movie, discussing plans to obtain some food and drugs, and he heard sniffing or snorting sounds as if they were using cocaine.

When Atef awoke early the next morning, Zavala was gone. Atef attempted to persuade his two remaining captors that the court had ruled the $80,000 was his and they should stop their involvement and free him. Zavala returned. Handing Atef a cell phone and dialing Atef's business, Zavala ordered Atef to obtain his business account number from his brother, Saeed. Atef complied without mentioning the kidnapping to Saeed. Dialing Atef's bank and again proving unable to obtain the account balance, Zavala became angry and punched Atef in the head. Zavala redialed Saeed, this time using the speaker function of the motel phone. Atef reobtained the number from Saeed, and Zavala was able to call the bank and determine Atef's account balance was not $80,000 but only $44,000.

Zavala told Atef they were taking him to the bank to withdraw the money and, if he did not comply, they would frame him for bank robbery. Zavala instructed Atef to write a note on an envelope stating "I'm here to rob the bank. I hold anthrax in an envelope, so do not scream, and put money in a bag." Zavala furnished Atef with an envelope containing white powder. Loading Atef into the van and transporting him to the

bank, the kidnappers again warned him they would frame him for robbery and harm his mother if he "ma[d]e a wrong move" in the scheme. Zavala instructed him that if he could not withdraw the entire $44,000 in cash, he should get a cashier's check in the name of "John Smith" for the balance. Atef entered the bank. Without success, he attempted to gain the attention of security personnel by displaying his torn clothing to the bank's security cameras. Informed by the teller he could only withdraw $10,000 in cash, he obtained a cashier's check made out to "John Smith" for the rest. Attempting to arouse suspicion, he wrote "Anthony Tamraz Newport Travelodge" at the top of the cash receipt, and told the teller to provide the ticket "if anyone asks questions."

Atef left the bank and spotted a police car in the parking lot, but the officer departed. Atef did not see the kidnappers' white van. Meanwhile, the teller telephoned the police after noticing Atef remained in the parking lot for 15 or 20 minutes. The officer returned and, at first, fearing for his safety, Atef said nothing, but then disclosed the ordeal he had undergone. He was later reassured no harm had come to his family.

Investigators discovered Reyes had used an expired driver's license to rent the Travelodge room around 8:30 p.m. on the night of the kidnapping, about a half-hour before Atef was abducted. The address on the driver's license led police to a postal box at a Newport Beach company named Commercial Mail Receiving Agency. In speaking with an employee there, the officers learned Reyes might have cell phone records with AT&T Wireless, and determined his current residence. The officers obtained a warrant for Reyes's AT&T cell phone records, which revealed more than 50 calls between Reyes's phone and Zavala's phone during the kidnapping. Cell tower records placed Reyes along the route Atef traveled on the day of the kidnapping and at or near the Travelodge when the room was rented and when Atef was taken to the bank the next day.

Zavala's phone records showed he called both Atef's business and bank during the kidnapping. Reyes cancelled his cell phone account a few days before police arrested him in December 2001.

The police apprehended Reyes and Derek Howard at Reyes's home. Howard's cell phone records and calls to and from Reyes placed him near the scene of the kidnapping and along the route Atef traveled earlier in the day. Searching a cabinet in Reyes's kitchen, the police found a photographic proof sheet and 35-millimeter negatives that included scenes of Reyes in leisure activities, but also photos of Atef and his residence and business. The police found a 35-millimeter camera and lens in Reyes's closet. They also found a lock pick set in the kitchen and photographs of Zavala in a kitchen mail slot. Elsewhere in the apartment, they discovered a black bag containing two hand-held radios and the paperwork to a police scanner. They also found a portable parabolic microphone and headset listening device, an item described as a "scope," and a business card for "Fox's Spy Outlet" advertizing a specialization in stun guns, protective sprays, and surveillance equipment. Tucked in a day planner in a cubby hole in the bedroom, police found Reyes's expired driver's license and a Disneyland identification card.[2] A backpack in the dining room contained Reyes's cell phone, pager, and his current driver's license. The police also found Howard's driver's license on the living room couch and his cell phone on the coffee table.

The police arrested Zavala at gunpoint at his apartment after he tried to escape when they announced they had a warrant for his arrest. Atef identified Zavala in a pretrial photo lineup as the kidnapper who punched him several times in the motel room and took charge of obtaining his financial information and funds from his bank. Atef also

[2] The clerk at the Travelodge motel had noted on Reyes's room registration card that he worked at Disneyland.

identified a man named David Vargas as one of the two men who first approached him from the white van and tried to abduct him. He identified Robert Cadavas as one of the men guarding him in the motel room. DNA evidence recovered from the motel room matched Vargas and Cadavas. Vargas and Cadavas pleaded guilty to simple kidnapping (§ 207) before trial, in exchange for eight-year prison terms. Howard also pleaded guilty to that charge and received a one-year jail term.

At trial, Reyes's sisters testified Howard was often at Reyes's home, even when Reyes's was absent, and that Howard treated Reyes's property as his own. Reyes's defense was that Howard had set him up by using his cell phone and the other items recovered at Reyes's apartment to perpetrate the kidnapping, including falsely registering the motel room in Reyes's name. Reyes's handwriting expert testified the signature on the Travelodge registration form was "most likely" someone else's, though the expert acknowledged it was "possible" Reyes had signed the form. Zavala presented no evidence.

II

DISCUSSION

A. *Suppression Motion*

Defendant Reyes contends the trial court erred in denying his motion to suppress his cell phone records as the product of an illegal search. (U.S. Const., 4th Amend.) He argues investigating officers violated his expectation of privacy in the contents of the postal box he rented from Commercial Mail Receiving Agency, a private mail receiving company. Specifically, the officers asked an employee there if defendant received mail at the facility and the clerk responded by reaching into defendant's postal box, retrieving three letters, and displaying them — without opening them — to the

officers. The outside of the envelope of one of the letters addressed to defendant indicated it was a bill from AT&T Wireless. Based on this allegedly illegal search, defendant complains the officers knew to direct a warrant for his cell phone records to AT&T Wireless instead of some other carrier, and subsequently obtained records showing calls to and from his mobile phone around the time of the kidnapping.

Defendant's claim of error is without merit because he did not hold a reasonable expectation of privacy in the outside of envelopes addressed to him when the employee removed them from his postal box. The Fourth Amendment does not protect every subjective expectation of privacy, but rather only objective expectations that society is prepared to accept as legitimate and reasonable. (*Rakas v. Illinois* (1978) 439 U.S. 128, 141.) Here, the officers did not search defendant's postal box or direct the clerk to reveal its contents. Rather, the clerk spontaneously displayed defendant's envelopes to the officers.

The Fifth Circuit Court of Appeals explained in *United States v. Osunegbu* (1987) 822 F.2d 472 (*Osunegbu*) why defendant's claim fails. First, because the information is foreseeably visible to countless people in the course of a letter reaching its destination, "an addressee or addressor generally has no expectation of privacy as to the outside of mail." (*Id.* at p. 480, fn. 3; accord, *United States v. Choate* (9th Cir. 1978) 576 F.2d 165, 175-177 (*Choate*); see also *United States v. Hinton* (9th Cir. 2000) 222 F.3d 664, 675 ["There is no expectation of privacy in the addresses on a package, regardless of its class"]; see generally 1 LaFave, Search and Seizure (4th ed. 2004) § 2.7(a), pp. 731-732.)

Second, *Osunegbu* explained the Fourth Amendment does not apply to an employee's removal of mail from a postal box at a private mail facility because there, as

here, "[t]he back of the box was open and the manager had complete and unfettered access to its contents. Although Mrs. Osunegbu argues that the manager had no authority to remove items from the box, she has pointed to no authority — either in the specific rental contract or otherwise — that supports this position. Given that the box is used solely by the renter to collect mail that the manager has already seen and handled, no legitimate purpose would be served by such a limitation on the authority of the manager." (*Osunegbu*, *supra*, 822 F.2d at p. 479.)

The *Osunegbu* court concluded these circumstances prevented a reasonable expectation of privacy, noting "the manner in which private postal facilities are run virtually necessitates that the manager be allowed to reenter a box and remove the contents. If the manager originally placed a small package in the box and later received more mail that would not fit into the box because of the package, she would then have to reenter the box and remove the package, because a package would be easier to keep track of in the office area than loose mail. More fundamentally, and as illustrated by this case, the manager needs to be able to reenter a box, remove the contents, and then examine them if she has reason to believe that she has mistakenly placed into a box mail addressed to someone other than the renter of that box. . . . It is in the interests of both the Postal Service and private postal facilities that the facilities maintain the right to reenter the rented boxes to check for such mail, and [the] Osunegbus did not even attempt, either contractually or otherwise, to prevent the manager from reentering the box for this purpose." (*Osunegbu, supra,* 822 F.2d at pp. 479-480.)

We perceive no basis on which to distinguish *Osunegbu*. There, as here, "the decisions as to when, and indeed whether, [fn. omitted] to put items into the box were left solely to the manager without any instructions . . . ." (*Osunegbu*, *supra*,

822 F.2d at p. 479.) It followed that the manager "could have allowed anyone to watch her sort the mail, or to examine thoroughly the mail while it was in the office area." (*Ibid*; see *Choate*, *supra*, 576 F.2d at p. 175 ["the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities"]; see also *Gabriel v. State* (Tex.Ct.App. 2009) 290 S.W.3d 426, 434 [store manager had authority to consent, as customer's agent, to search of postal box].) As in *Osunegbu*, nothing prevented personnel in defendant's mail facility from retrieving mail in his box and re-sorting it at the counter in public view, or providing access to anyone to areas where mail was sorted, stored for sorting, or held for a customer. As the *Osunegbu* court aptly observed, "a party has no reasonable expectation of privacy as to the outsides of items stored in a common area . . . ; such items are exposed both to those who have access to that area and to those, including law enforcement officers, who may be given permission to enter that area." (*Osunegbu*, *supra*, 822 F.2d at p. 479.) Similarly, there can be no reasonable expectation of privacy in the outside surface of items that may be held or handled in a common area.

True, the owner of the mail facility testified here that "*[n]ormally* we don't, you know, show any mail to anybody unless we have a search warrant or some court papers, you know, that tells us to show it." (Italics added.) But the trial court, as the trier of fact at the suppression hearing, could reasonably interpret the owner's ambiguous use of the word "normally" as a less-than-categorical statement that left open the possibility mail might be shown to others at an employee's discretion, or otherwise exposed to public view. (See *People v. Glaser* (1995) 11 Cal.4th 354, 362 [reviewing court determines legality of search de novo, but defers to trial court's express or implied factual findings if supported by substantial evidence]; *People v. Davis* (2005) 36 Cal.4th 510,

528-529 [appellate court must view record in denial of suppression motion "'in the light most favorable to the trial court's ruling'"].)

In any event, no evidence showed the mail facility promised or communicated a warrant-only policy to defendant. As in *Osunegbu*, no evidence showed defendant's contract with the mail facility included such a policy or that defendant instructed the mail facility to handle his mail a particular way or attempted to restrict employees from removing mail already placed in his box, which *Osunegbu* observed would be contrary to expected practice. Here, defendant nowhere negated the reality that mail facility operations routinely entail employees having continuous access to postal boxes.

Defendant asserts "[h]e did not have any belief that the employees of the business would ever remove mail from the boxes or that law enforcement or anyone else could simply look at the mail in his box on request." But as *Osunegbu* explained, such a subjective belief is unreasonable, and therefore outside the Fourth Amendment's protection, given the manner in which mail facilities operate. In particular, those operations include ready employee access, at the employee's discretion, to the open side of the box to retrieve mail, during which time the employee may, whether purposefully or inadvertently, expose the outside of the mail to any number of persons. These circumstances preclude any reasonable expectation of privacy in any markings displayed on the outside of the envelope, such as those identifying AT&T Wireless as the addressor here. Consequently, the trial court did not err in denying defendant's suppression motion.

B. *Lock Pick Set*

Defendant Reyes argues the trial court erred in admitting a lock pick set found in his apartment. He contends that because no evidence demonstrated the

perpetrators used a lock pick set, the one discovered in his possession had "no relationship to the charged crime." According to defendant, it therefore constituted irrelevant, inadmissible character evidence that prejudiced him in the eyes of the jury as a "criminal type" who should be punished regardless of his guilt or innocence of the instant offense because he "had the tools to commit other crimes . . . ." (See Evid. Code, § 1101, subd. (a)[generally barring evidence of a defendant's bad character or propensity to commit crime].) We are not persuaded.

In admitting the lock pick set over defendant's objection, the trial court stated: "[A]s to the other crime[s claim], I have a representation by the district attorney that he's not going to argue [any other crimes] and make that clear to the jury. It has to do with the limited argument that this piece of evidence is available to the defendant for the purpose of facilitating the [kidnapping], and that's the extent of it. I'm not commenting as to what weight, if any, that has. I'm simply allowing it to be within the range of that argument."

Asserting the trial court erred, defendant relies on inapposite cases involving guns. He cites, for example, the Supreme Court's statement: "When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons." (*People v. Riser* (1956) 47 Cal.2d 566, 577, disapproved on other grounds in *People v. Chapman* (1959) 52 Cal.2d 95 and *People v. Morse* (1964) 60 Cal.2d 631; see also *People v. Henderson* (1976) 58 Cal.App.3d 349, 360 ["Evidence of possession of a weapon not used in the crime charged against a defendant leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly

weapons — a fact of *no relevant* consequence to determination of the guilt or innocence of the defendant" (original italics)].)

The established rule for burglary tools, however, is different. "[T]he possession of [tools] . . . reasonably adapted to use in connection with the commission of a burglary *whether so used or not*, is properly admissible as showing defendant's felonious intent." (*People v. Wilson* (1965) 238 Cal.App.2d 447, 464 (*Wilson*), italics added; *People v. Darling* (1989) 210 Cal.App.3d 910, 912-914 (*Darling*) [evidence that defendant possessed screwdriver was relevant to prove defendant entered building with intent to steal even though no screwdriver used during burglary].) As the prosecutor argued, the tool set was similarly relevant to defendant's intent to kidnap the victim because, like "[t]he high tech scope as well as the listening device that was found [and] the walkie-talkies, the lock pick is just another tool of the trade that can be used for kidnapping a person if you need to get into a room or a vehicle that they are in."

Unlike a gun, with its many lawful uses, possession of a lock pick set bears rationally on the defendant's preparation and intent to commit a crime. (See *Wilson* and *Darling*, *supra*.) Consequently, admission of the set did not constitute unlawful disposition evidence. (Evid. Code, § 1101, subd. (b) ["Nothing in this section prohibits . . . admission of evidence . . . relevant to prove . . . intent, preparation, plan, knowledge, identity . . . ."].) As the court observed in *Darling*, to the extent possession of burglarious tools may appear to be evidence of a character trait, "even character evidence may be admissible on the issues of intent, preparation, and plan." (*Darling*, *supra*, 210 Cal.App.3d at p. 914, fn. 2.) Defendant does not suggest the trial court failed to keep the prosecutor on a short leash to avoid suggesting the lock pick set connected defendant

to any other crimes or that it showed he was a person of bad character. Accordingly, we discern no error in the admission of the evidence.

C. *Photo Lineup*

Defendant Zavala contends his trial attorney rendered ineffective assistance of counsel by failing to object to a photo lineup in which Atef identified Zavala as one of his kidnappers. Police conducted the lineup approximately four months after the kidnapping. Atef did not identify Zavala at trial. As we explain, Zavala's attack on the photo lineup as unconstitutionally suggestive is meritless. Consequently, his ineffective assistance of counsel claim also fails because defense counsel is not required to make futile objections or advance meritless arguments. (*People v. Cudjo* (1993) 6 Cal.4th 585, 616; *People v. Thomas* (1992) 2 Cal.4th 489, 531; see *Strickland v. Washington* (1984) 466 U.S. 668, 688 [counsel's performance must fall below an objective level of reasonableness and prejudice defendant].)

"Due process requires the exclusion of identification testimony only if the identification procedures used were unnecessarily suggestive and, if so, the resulting identification was also unreliable." (*People v. Yeoman* (2003) 31 Cal.4th 93, 123.) "If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1242, overruled on other grounds in *People v. Edwards* (1991) 54 Cal.3d 787, 835.) Defendant bears the burden on both issues. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.)

As to the first issue, undue police suggestion, the question is not whether there were differences between the lineup participants, but "whether anything caused defendant to 'stand out' from the others in a way that would suggest the witness should

select him." (*People v. Carpenter* (1997) 15 Cal.4th 312, 367, superseded by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1107.) On appeal, defendant points to no signature quality or tainting characteristic in his photograph leading a witness to select it or making the lineup impermissibly suggestive. "Nor does our independent review of the lineups reveal any suggestion of '"the identity of the person suspected by the police."'" (*People v. Avila* (2009) 46 Cal.4th 680, 699 (*Avila*).)

Defendant insists "[t]he fact that [he] is clean-shaven causes [his] picture to stand out." But of the six men in the lineup, none is hirsute, two besides defendant appear to be entirely clean-shaven or have, at most, a faint shadow of chin stubble, and a fourth has — in defense counsel's words at trial — just "a three, four-day growth of facial hair." Indeed, the two men with the most facial hair sport only chin patches. And while defendant complains his "hair is full and brushed back, almost perfectly framing his face," the same is true for all the men in the array, who wore remarkably similar hair styles. Demeaning no one, we can categorically say that neither a hairstyle, nor a beard, or the lack of one, distinguished any of the men depicted in the array.

Defendant also highlights that he is one of two men wearing a potentially attention-attracting red shirt, and characterizes the other man as being in his teens and therefore unlikely to be selected. He notes Atef's pre-array description of the perpetrator he later identified as defendant was rather generic: male, Hispanic, in his 20's, around 5 feet, 7 inches tall, and "skinny." Defendant asserts he is the only man depicted in the array who appears to be in his 20's and that he is the leanest of the group. He further breaks the array down by the subjects' gaze, noting he is only one of three with a far-off

look, and of these three, he claims the victim was unlikely to select the other two because one is "much older" and one "much younger."

Defendant's fine parsing is unavailing. The relevant inquiry is undue suggestion by the police (*Avila*, *supra*, 46 Cal.4th at p. 699), and the lengths to which defendant stretches demonstrates there was none of any significance. If anything, one could argue — still without merit — that the police highlighted for selection the sole person depicted in a white shirt. Despite defendant's characterization, all the men appeared to be in their 20's and none was significantly heavier or thinner than the others. Had defense counsel objected on the basis of undue suggestion, we would review the trial court's determination de novo. (*Ibid.*) Here, our review confirms there was no basis for sustaining such an objection, had it been made.

Defendant protests that the police did not conduct the photo lineup until four months after the offense. "While this fact goes to the *reliability* of the identification, it does not affect a determination whether the lineup was unduly suggestive." (*Avila*, *supra*, 46 Cal.4th at p. 699, original italics.) As in *Avila*, "[b]ecause we have concluded the lineup was not unduly suggestive, we need not consider whether it was reliable under the totality of the circumstances." (*Ibid.*) In sum, because there is no merit to defendant's claim the lineup was suggestive, defendant's attack on counsel for failing to object on this ground fails.

D. *Cruel or Unusual Punishment*

Citing *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*), Reyes and Zavala each contend California's proscription against cruel or unusual punishment (Cal. Const., art. I, § 17) required the trial court to grant their motions to reduce their sentences from life in prison with parole as mandated by section 209 (aggravated kidnapping, extortion)

to determinate terms of three, five, or eight years for simple kidnapping (§§ 207, 208). The trial court did not err in denying the motions.

The test under the state Constitution is whether the punishment is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*).) The defendant must demonstrate the punishment is disproportionate in light of (1) the offense and defendant's background, (2) more serious offenses, or (3) similar offenses in other jurisdictions. (*Id.* at pp. 429-437; accord, *Dillon*, *supra*, 34 Cal.3d at pp. 479, 487, fn. 38.) The defendant need not establish all three factors, one may be sufficient. (*Dillon*, at p. 487, fn. 38.) We review the factors de novo to determine whether the defendant has established his sentence runs afoul of the prohibition against cruel or unusual punishment. (*People v. Mora* (1995) 39 Cal.App.4th 607, 615.)

Defendants rely on the first prong of the *Lynch/Dillon* analysis, and they also correctly note the punishment imposed on other participants in the crime may factor in the proportionality analysis. (See *Dillon*, *supra*, 34 Cal.3d at p. 488 ["defendant received the heaviest penalty provided by law while those jointly responsible with him received the lightest — the proverbial slap on the wrist"].) The defendant, however, must overcome a "considerable burden" to show the sentence is disproportionate to his level of culpability. (*People v. Wingo* (1975) 14 Cal.3d 169, 174 (*Wingo*).) This is particularly true for sentences mandated by statute, as is the case for aggravated kidnapping. (See *People v. Martinez* (1999) 76 Cal.App.4th 489, 494 ["Fixing the penalty for crimes is the province of the Legislature, which is in the best position to evaluate the gravity of different crimes and to make judgments among different penological approaches"]; accord, *Wingo*, at p. 174.) As a result, "[f]indings of disproportionality have occurred

with exquisite rarity in the case law." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.)

Defendants' principal argument on which they base their claim of disproportionality is that while they received life sentences after trial, their coperpetrators, Vargas and Cadavas, agreed to eight-year terms in a plea bargain, and Howard received only a one-year term in exchange for his plea. Defendants complain the discrepancy rises to an unconstitutional level because Vargas and Cadavas exposed Atef to the most danger by physically abducting him into the white van. These actions, however, were consistent with the simple kidnapping charge to which the pair pleaded guilty. As we have observed in another case, "A demand for ransom . . . aggravates the crime because protracted confinement and the forcible control necessary to maintain it dramatically increase the danger to the victim." (*In re Nuñez* (2009) 173 Cal.App.4th 709, 726 (*Nuñez*).) Because the jury convicted Reyes and Zavala of the more serious crime of kidnapping Atef to extort a ransom, the trial court could reasonably conclude they merited the harsher statutory penalty the Legislature has mandated for that offense.

Specifically, the evidence showed Reyes's cell phone records, in the words of the prosecutor, "tracked a human target" from Orange County to Los Angeles and back, and then to the Travelodge where Reyes rented a room. The evidence also showed Reyes had earlier taken surveillance photos of the victim, his house, and his business, which Zavala used to extort money from Atef by terrorizing him with threats to his family's safety. The jury could reasonably conclude from these actions that Reyes played a significant role in abducting and holding Atef to extort ransom, and therefore, when it came to sentencing, could not, as the prosecutor phrased it, "s[i]t back as his minions [had] beat and drugged the victim in this case over money."

Atef's testimony also showed Zavala was the one who threatened his family's safety while showing him photographs, beat Atef on at least two occasions to extract his bank account information from him, drugged him, and then took charge of the bank operation in which he forced Atef to fill out a bank robbery note demanding money, provided Atef with purported anthrax to back up the demand, and threatened Atef he would call the police to report a bank robbery if Atef did not withdraw money as demanded. In short, Reyes and Zavala, as ringleaders in orchestrating the details of the operation, deserved more severe punishment than that meted out to Vargas and Cadavas as the "muscle" behind the initial abduction. At bottom, the question is whether the punishment is so extreme as to be disproportionate to the individual's culpability (*Dillon*, *supra*, 34 Cal.3d at p. 479), and on the foregoing record, neither Reyes nor Zavala were entitled to have the statutory penalty reduced on constitutional grounds.

Reyes protests that the prosecutor's one-year plea deal "purchased the silence of Derek Howard," "who was the only witness who could have confirmed [Reyes's] theory of defense, that [Howard] or others used [Reyes's] ID and personal property (including his AT&T cell phone) in the commission of the crime," but "was permitted to plead guilty and sentenced to one year in jail . . . ." But Reyes cannot complain his sentence is disproportionate to Howard's merely on the basis of the plea deal. A sentence struck by way of a plea bargain does not represent a finely calibrated estimation of that defendant's culpability, but rather may reflect other factors, including credit for cooperation with authorities, problems of proof, or preserving state resources by avoiding trial. (See, e.g., Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 7th ed. 2004) Pleas and Settlements § 10.36, p. 236 [prosecutor "may be concerned about potential problems of proof, or protecting victims from having to testify" but "court's and

prosecutor's primary reason for plea bargaining is to save money by eliminating court congestion"].)

In any event, if Reyes wanted to demonstrate Howard was also a ringleader or that his role was greater than the evidence showed, or test Howard's credibility in light of the plea deal, he could have called him to the stand since Howard's plea terms required him to testify truthfully. Neither the prosecutor, nor Reyes called Howard to testify. The evidence produced at trial pointed to Reyes rather than Howard as a ringleader, marking Reyes as far more culpable and deserving of a much harsher sentence than Howard. While Howard's cell phone records connected him to the efforts tracking Atef on the day of the kidnapping, and there were three calls between him and Reyes the next day, no eyewitness identification or DNA evidence established he participated in the actual abduction. Moreover, Reyes's surveillance photos of Atef's residence showed his involvement began much earlier than Howard's, consistent with a ringleader's planning role. Additionally, the apparent use of his apartment as a base of operations before or after the kidnapping, his renting of the motel room during the kidnapping, and his 50-plus cell phone exchanges with Zavala, the ringleader in charge inside the motel room, made clear that Reyes, unlike Howard, also exercised a leadership role in the scheme. We find no merit in Reyes's claim of unconstitutional disproportionality, and his cruel or unusual punishment claim therefore fails.

Zavala protests that the trial court failed, in refusing to depart from the statutory life sentence on constitutional grounds, to take into account his amply corroborated postoffense reform, based on his religious conversion and ensuing commitment to ministry to others. He argues: "In essence, the man that was convicted of committing the 2001 offense was not the same man [who] was being sentenced in 2007."

Assuming Zavala's laudable reformation is true, however, does not establish his sentence violated constitutional boundaries. As we observed in *Nuñez*, "Valid penological goals include retribution, incapacitation, rehabilitation, and deterrence" (173 Cal.App.4th at p. 730), and the state is free in apportioning penalties to choose among these objectives, within constitutional bounds. (*Wingo*, *supra*, 14 Cal.3d at p. 174.) While Zavala's reform is pertinent to show a lesser need for his incapacitation and rehabilitation, and thus, if maintained, will undoubtedly factor in the parole process (see § 3046 [life term inmate may be paroled after seven years]), the state's retributive and deterrence interests support severe punishment. Given Zavala's leadership role in Atef's ordeal and, as the Attorney General notes, the "horror of kidnapping [citation] and the substantial risk to human life that it presents [citation]" (*People v. Castillo* (1991) 233 Cal.App.3d 36, 66), we cannot say imposition of the statutory life term constitutes cruel or unusual punishment.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, ACTING P. J.

IKOLA, J.